Team 12P - Original

No. 22-305

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS COLLINS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER

Team 12P
Counsel for Petitioner

QUESTIONS PRESENTED

I. Under the Fourth Amendment, does the Government's warrantless insertion of a key into a locked storage unit to obtain identifying information constitute an unreasonable search, when the storage unit is located inside a locked room within the same residential apartment complex?

II. Under the Sixth Amendment, does the right to counsel attach when a pre-indictment conversation with an undercover government agent occurred after the Government had effectively completed its investigation and committed itself to prosecuting the defendant, as demonstrated by sending target letters, searching the defendant's home, and taking a material witness deposition?

III. Under the Federal Rules of Evidence, does Rule 804(b)(1) permit admission of exculpatory grand jury testimony from a now unavailable witness when the Government's motive in both proceedings would have been similar because its fundamental objective was establishing the defendant's knowledge of the alleged crimes?

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OPINION BELOW

The judgment of the United States Court of Appeals for the Fourteenth Circuit*, Thomas Collins v. United States of America*, No. 22-173, was entered June 23, 2022, and may be found in the Record. (R. 54–64.)

CONSTTITUTIONAL AND STATUTORY PROVISIONS

The text of the relevant constitutional provisions appear below. The relevant statutory provisions include 18 U.S.C. §§ 1955, 1956 and Boerum Penal Code § 68.01.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

U.S. CONST. amend VI.

STATEMENT OF THE CASE

I. Statement of Facts

Thomas Collins ("Mr. Collins") is the sole owner and operator of Hoyt's Tavern ("Hoyt's"). (R. 55.) In an effort to help his longtime friend, Mr. Collins rented out the basement of Hoyt's to Roxanne Roulette ("Ms. Roulette"), who, without Mr. Collins' knowledge, began operating an illegal gambling enterprise in the basement. (R. 25–26.) Ms. Roulette's gambling

operation was supported primarily by Lucy Washington ("Ms. Washington"), who moonlit as a bartender at Hoyt's when she was not acting as a bookie for Ms. Roulette. (R. 22–23.)

The FBI first became aware of suspicious activity occurring at Hoyt's in September 2020 based on a tip from the IRS claiming that Hoyt's income led them to believe there were potentially questionable business practices occurring. (R. 44.) Based solely on this tip, the FBI began an investigation into Hoyt's led by Special Agent Omar Sayed ("Agent Sayed"). (R. 44.) During this investigation, Agent Sayed learned of Ms. Roulette's illegal gambling operation and of her company, Gourmet Grocers. (R. 44.) Agent Sayed further found that Gourmet Grocers, Hoyt's largest vendor, was laundering money from the illegal gambling operation and funneling portions of the proceeds to Brooklania through Pavel Hoag-Fordjour ("Mr. Hoag-Fordjour"). (R. 44.) After learning that Mr. Hoag-Fordjour had been in Boerum City, the FBI served him with a material witness warrant on January 5, 2021 and Assistant United States Attorney Twyla Twerski ("AUSA Twerski") conducted his material witness deposition three days later. (R. 11, 45.)

Almost two full weeks after the material witness deposition, Agent Sayed sent Mr. Collins and other individuals associated with Hoyt's letters informing them that they were targets of the FBI's investigation. (R. 45.) At this time, Agent Sayed also "hatched a plan" with AUSA Twerski to conduct an undercover operation at Hoyt's to gather more information from Mr. Collins. (R. 45.) Additionally, due to her strong ties with Brooklania, Agent Sayed believed Ms. Roulette was a particularly high flight risk so, on January 25, 2021, the FBI arrested her. (R. 46.) However, Ms. Roulette was subsequently released on bail and fled to Brooklania. (R. 46.)

The following day, Agent Sayed and Special Agent Stephan Simonson ("Agent Simonson") went to Mr. Collins' apartment to take a look around. (R. 46.) Mr. Collins "consented to a cursory search of his apartment, and not his storage unit." (R. 56.) However, Agent Simonson

found a set of keys in a bedroom that included a small gold key and an electronic key fob. (R. 56.) Although Mr. Collins told Agent Simonson the keys were for his vacation home in Colorado, Agent Simonson went to the lobby and used the electronic key fob to open a door marked "Storage for Floors 7-15/PH." (R. 56.) Once in the storage room, Agent Simonson tried the gold key in several locks until it finally fit in Mr. Collins' storage locker. (R. 56.) Agents Sayed and Simonson subsequently obtained a search warrant for Mr. Collins' apartment and storage locker. (R. 56.)

The FBI executed the search warrant the morning of January 27, 2021. (R. 56.) In the storage locker, the FBI found "personal belongings" "like books, clothes, [and] furniture" as well as other allegedly incriminating information. (R. 47.) After this search, Agent Sayed admittedly "knew we had enough evidence at this point," to formally charge Mr. Collins. (R. 47.) But because the plans for the covert interrogation were already set, the FBI sent an undercover agent to Hoyt's to solicit incriminating evidence from Mr. Collins. (R. 47.) Immediately after this, the FBI arrested, charged, arraigned, and held Mr. Collins without bail. (R. 56.)

Approximately one month after Mr. Collins was formally arrested, Ms. Washington admitted to being Ms. Roulette's "right-hand woman" during the grand jury proceedings. (R. 22.) Ms. Washington further testified that Ms. Roulette orchestrated the illegal gambling operation and conducted all affairs without Mr. Collins' knowledge. (R. 22.) Despite this, the grand jury returned a true bill indicting Mr. Collins for illegal gambling and money laundering. (R. 2.) Unfortunately, Ms. Washington was tragically killed in a bicycle accident on June 21, 2021. (R. 10.)

II. Procedural History

Prior to trial, Mr. Collins filled motions to suppress regarding two issues: (1) "whether testing a key to a storage unit constituted a search under the Fourth Amendment" and (2) "whether the Sixth Amendment right to counsel attached during the defendant's conversation with the

undercover agent." (R. 29.) The trial court reluctantly denied both motions. (R. 35, 41.) Additionally, Mr. Collins moved to admit Ms. Washington's grand jury testimony under Federal Rule of Evidence 804(b)(1). (R. 50.) Again, the trial court denied this motion. (R. 53).

Mr. Collins was ultimately convicted "in connection with conducting an illegal gambling business and laundering of monetary instruments" on October 5, 2021, which he timely appealed. (R. 55.) The Fourteenth Circuit later affirmed each of the trial court's conclusions, holding: (1) an unreasonable search had not occurred; (2) the right to counsel had not attached during the undercover conversation; and (3) the grand jury testimony was inadmissible. (R. 58, 59, 61.) On December 13, 2022, this Court granted Mr. Collins' petition for writ of certiorari. (R. 65.)

SUMMARY OF THE ARGUMENT

The Fourteenth Circuit incorrectly applied this Court's precedent to determine a search had not occurred when Agent Simonson inserted the key into Mr. Collins' lock. Under either the common-law trespassory test or the reasonable expectation of privacy test, Agent Simonson's actions constituted a search. These tests dictate that whenever a government agent either physically occupies a constitutionally protected area for the purpose of obtaining information or violates a person's reasonable expectation of privacy, a search has occurred. Further, warrantless searches are per se unreasonable, unless a valid exception to the warrant requirement applies. Agent Simonson not only physically occupied Mr. Collins' lock for the purpose of obtaining information, but he also violated Mr. Collins' reasonable expectation of privacy in the lock; thus, a search had occurred under either test. This search occurred without a warrant, and the Government cannot demonstrate that a valid exception to the warrant requirement existed at the time of the search. Therefore, Agent Simonson's warrantless insertion of the key into Mr. Collins' lock was an unreasonable search, and this Court should reverse the decision of the Fourteenth Circuit below.

Additionally, this Court should reverse the Fourteenth Circuit's decision to admit Mr. Collins' statements solicited by an undercover agent and instead find that Mr. Collins' Sixth Amendment right to counsel attached at the time of the covert conversation. Despite the extensive history and policy behind the right to counsel, the Fourteenth Circuit adopted an erroneously narrow interpretation of *United States v. Kirby* and effectively reduced this constitutional right to a list of five events. Rather, in order to ensure an individual is able to rely on the guiding hand of counsel to navigate the intricacies of the legal system, the right to counsel must apply whenever the prosecutorial forces of organized society confront an individual. Therefore, after being explicitly targeted, subjected to a search, and discussed during a material witness deposition, Mr. Collins was no longer a suspect, but was, instead, an accused. Because the Government accused Mr. Collins of a crime and confronted him during the surreptitious conversation, Mr. Collins should have been afforded the full protection of his Sixth Amendment right to counsel.

Finally, this Court should also reverse the Fourteenth Circuit's decision to exclude relevant grand jury testimony because the Government had a similar motive in examining Ms. Washington at the grand jury proceedings as it would have had at trial. Under the Federal Rules of Evidence, the former testimony of a now unavailable witness may be admissible at trial if the party against whom the testimony is being brought had similar motive and opportunity in examining the witness at the previous proceeding. Although there has been limited guidance as to what constitutes "similar motive," the inherent reliability of former testimony indicates that similar motive may be found by evaluating the fundamental objectives of the Government's line of questioning. Accordingly, by questioning a key witness about essential elements of the alleged crimes committed by Mr. Collins, and by ensuring the witness was testifying honestly, the Government

had a similar motive in questioning the witness at the grand jury proceedings as it would have had at trial. Therefore, the Fourteenth Circuit erroneously excluded the grand jury testimony.

Consequently, this Court should reverse the Fourteenth Circuit's decision (1) finding an unreasonable search had not occurred, (2) admitting allegedly incriminating statements made to an undercover agent outside the presence of counsel, and (3) excluding relevant grand jury testimony of a now unavailable witness.

ARGUMENT

I. The Government's warrantless insertion of a key into a locked storage unit to determine ownership of the storage unit constitutes an unreasonable search under the Fourth Amendment.

The Fourteenth Circuit erred because it failed to properly apply this Court's precedent to determine that a search had occurred, which deprived Mr. Collins of his liberty guaranteed by the Fourth Amendment. (R. 57.) This Court has outlined two tests to determine whether a search has occurred for Fourth Amendment purposes: (1) the common-law trespassory test, and (2) the reasonable expectation of privacy test. *United States v. Jones*, 565 U.S. 400, 409 (2012). And, absent one of the few valid exceptions, warrantless searches are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). Under either test, Agent Simonson's warrantless insertion of the key into Mr. Collins' locked storage unit amounted to an unreasonable search in violation of the Fourth Amendment. Accordingly, this Court should reverse the decision below. (R. 57.)

A. Inserting a key into a locked storage unit located inside a secure area within an apartment complex to obtain identifying information is a search under either the common-law trespassory or the reasonable expectation of privacy test.

In order to prevent the Government from infringing on "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches" without a warrant, this Court has promulgated two tests to decide whether a government actor's conduct amounts to a search. U.S. CONST. amend. IV; *Jones*, 565 U.S. at 409. First, to preserve the

protection against Government intrusion that existed at the time of the Fourth Amendment's adoption, this Court has always maintained a property aspect to the analysis through the application of common-law trespass. *Jones*, 565 U.S. at 408–09. Second, this Court expanded the reach of the Fourth Amendment beyond common-law trespass in order to "protect[] people, not places." *Katz*, 389 U.S. at 351. From this, Justice Harlan articulated the reasonable expectation of privacy test: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). Under either of these tests, Agent Simonson's insertion of the key into Mr. Collins' lock constituted a search for Fourth Amendment purposes.

i. A government agent's insertion of a confiscated key into a lock constitutes a search because the Government physically occupied personal property for the purpose of obtaining information.

By inserting the key into the lock, Agent Simonson physically occupied Mr. Collins' personal property, the lock, for the purpose of obtaining information. (R. 7.) And when "the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred." *Jones*, 565 U.S. at 406 n.3.

Overreliance on the reasonable expectation of privacy test compelled this Court to hear *Jones* to refocus the understanding of Fourth Amendment protections in light of its original purpose. *See id.* at 406–09. Indeed, this Court repeatedly emphasized that the reasonable expectation of privacy test was a supplement—not a substitute—for the common-law trespassory test. *Id.* at 406, 407, 409. Using the common-law trespassory test, this Court found that attaching a GPS device to a car and using that device to monitor the car's whereabouts was a search because such "physical intrusion" "for the purpose of obtaining information" would undoubtedly have been considered a search for Fourth Amendment purposes when it was adopted. *Id.* at 404–05.

A mere one year after *Jones*, this Court again seized the opportunity to cement the common-law trespassory test's place in its Fourth Amendment jurisprudence. *Florida v. Jardines*, 569 U.S. 1, 5 (2013). In what this Court called a "straightforward" case, the Government's use of a drug-sniffing dog on the defendant's front porch was deemed a search because it attempted to gather information by physically entering and occupying the area around the defendant's home without his permission. *Id.* at 3, 5–6. In its reasoning, this Court noted that government agents, without a warrant, may walk up to the front door of a home and knock, "precisely because that is 'no more than any private citizen might do.'" *Id.* at 8 (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)). But a visitor engaged in conduct exceeding the customary knocking invitation, such as exploring one's front yard with a metal detector or drug-sniffing dog, would prompt most people to "call the police." *Id.* at 9. Reinforcing the principle that the reasonable expectation of privacy test did not displace the common-law trespassory test, Justice Scalia noted the common-law trespassory test provided the "exclusive basis" for Fourth Amendment protections for the majority of the Amendment's existence. *Id.* at 5, 11. Thus, it is unnecessary to proceed to the reasonable expectation of privacy test whenever the common-law trespassory test applies. *Id.* at 11; *see also Jones* 565 U.S. at 407 ("[defendant's] Fourth Amendment rights do not rise or fall with [*Katz*]").

Despite the Fourteenth Circuit's struggle to apply the common-law trespassory test, other circuits have more aptly applied *Jones* and *Jardines*. For example, the Ninth Circuit determined a search had occurred where the Government inserted a key into defendant's car door lock to determine its ownership. *United States v. Dixon*, 984 F.3d 814, 816 (9th Cir. 2020). Relying solely on the reasonable expectation of privacy test, the Ninth Circuit had previously held that such conduct did not amount to a search. *Id.* But, after acknowledging how *Jones* altered the Fourth Amendment calculus, it found physically inserting a key into a car's lock to obtain information

constituted a search, and its previous decision holding otherwise was "clearly irreconcilable" with *Jones* and *Jardines*. *Id.* at 819; *see also United States v. Richmond*, 915 F.3d 352, 359 (5th Cir. 2019) (finding a search where, "regardless of how insignificant it might seem," a state trooper used his finger to push against a tire he suspected contained more than air); *Taylor v. City of Saginaw*, 922 F.3d 328, 333 (6th Cir. 2019) (finding a search where the Government marked defendant's tires with chalk to determine how long defendant remained parked in one place). Likewise, the First Circuit found "the turning of the key in the lock of [defendant's girlfriend's apartment] was an unreasonable, warrantless search." *United States v. Bains*, 874 F.3d 1, 11 (1st Cir. 2017). There, the court determined that because the lock was part of the home's curtilage and a constitutionally protected "effect," a search had occurred under both tests. *Id.* at 12–16.

From these cases, a simple three-part test emerged: (1) whenever the Government physically occupies or trespasses (2) a constitutionally protected area (3) for the purpose of obtaining information, a search has occurred for Fourth Amendment purposes. *See Taylor*, 922 F.3d at 332–33. Applying this test to the case at hand, this Court should find a search occurred because Agent Simonson physically occupied Mr. Collins' lock for the purpose of obtaining information. (R. 7.) First, like the insertion of keys into locks were "physical intrusion[s]" in *Bains* and *Dixon*, by inserting the key into Mr. Collins' lock, Agent Simonson physically occupied Mr. Collins' property. (R. 7); *Dixon*, 984 F.3d at 820; *Bains*, 874 F.3d at 15. Second, like the car tires from *Richmond* and *Taylor* were considered constitutionally protected effects, so too is the lock of Mr. Collins' storage unit. (R. 7); *Richmond*, 915 F.3d at 359; *Taylor*, 922 F.3d at 333. Third, like the Government's purpose behind the insertion of the keys in *Dixon* and *Bains*, Agent Simonson physical intruded upon Mr. Collins' property solely for obtaining information, i.e., whether Mr. Collins had control over the storage unit. (R. 7); *Dixon*, 984 F.3d at 820; *Bains*, 874 F.3d at 15.

The common law trespassory test "keeps easy cases easy." *Jardines*, 569 U.S. at 11. That Agent Simonson learned what he learned only by physically intruding on Mr. Collins' property to gather evidence is enough to establish that a search occurred. *See id.* In other words, if Mr. Collins were to find one of his neighbors inserting a key into the lock of his storage unit, this intrusion would certainly prompt him to call the police. *See id.* at 9. As such, this Court should reverse the Fourteenth Circuit's decision and find that a search occurred. (R. 57.)

ii. A government agent's insertion of a confiscated key into a lock constitutes a search because it violated the lock owner's reasonable expectation of privacy in an area that society recognizes as reasonable.

By inserting the key into the lock of his storage unit, Agent Simonson violated Mr. Collins' reasonable expectation of privacy in an area that society recognizes as reasonable, which amounts to a search for Fourth Amendment purposes. (R. 57.) As it stands today, there is an imbalance in the courts' interpretation and application of the Fourth Amendment such that individuals who live in apartments, rather than free-standing homes, are denied the same level of protection against unreasonable searches because courts have been reluctant to extend the protections afforded to the curtilage of a home to certain areas of multi-dwelling structures. *See, e.g.*, *United States v. Sweeney*, 821 F.3d 893, 901–02 (7th Cir. 2016). However, this case presents an opportunity for this Court to correct that imbalance and assure the same basic level of Fourth Amendment protection to individuals no matter their housing status or socioeconomic background.

In addition to the common-law trespassory test, the other means for determining whether a search occurred for Fourth Amendment purposes is the reasonable expectation of privacy test. *Jones*, 565 U.S. at 409. This test rose to prominence following *Katz*, where the Government's use of an electronic listening device to record a defendant's conversation in a public telephone booth constituted a search. 389 U.S. at 353. Specifically, Justice Harlan described the reasonable

expectation of privacy test as protecting that which a person has a subjective expectation of privacy in which society agrees is objectively reasonable. *Id.* at 361 (Harlan, J., concurring). *Katz* also famously proclaimed that "the Fourth Amendment protects people, not places," and "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* at 351 (majority opinion). These proclamations were necessary to support the majority's finding that the search was a violation of the "privacy upon which [Katz] justifiably relied." *Id.* But because the Fourth Amendment names neither conversations nor public telephone booths as being under the umbrella of its protections, necessity compelled this Court to promulgate the reasonable expectation of privacy test. U.S. CONST. amend. IV.

Searches of houses, on the other hand, are explicitly protected by the Fourth Amendment. *Id.* Naturally, questions arose about how far from a house the Fourth Amendment could reach, and the answers to these questions largely came from cases distinguishing open fields from the curtilage of the house. *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 176 (1984). To aid in the resolution of these questions, this Court described a four-part test that could be deployed as a "useful analytical tool" to determine the scope of a home's curtilage: (1) the proximity of the claimed curtilage to the home itself; (2) whether the claimed curtilage "is included within an enclosure surrounding the home;" (3) what the claimed curtilage is used for; and (4) any steps taken by the homeowner to shield the claimed curtilage from the eyes of passersby. *United States v. Dunn*, 480 U.S. 294, 301 (1987). Importantly, this Court qualified the test because it should not be rigidly applied in every scenario to accurately determine a curtilage question; rather, the primary focus should be "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Id.* This connection between the home and the curtilage must be the primary focus because the concept of curtilage

evolved under English common law to extend protection under burglary law to the areas surrounding the house itself. *Id.*

But the concept of curtilage was mainly developed in a rural setting, looking to extend the curtilage to barns. *See, e.g.*, *Id.* at 297; *Oliver*, 466 U.S. at 173–74. Because of this limited historical application, courts have been reluctant to extend the curtilage protection to certain areas in urban settings, creating a disparity in Fourth Amendment protection. *See, e.g.*, *Sweeney*, 821 F.3d at 901–02; *United States v. Correa*, 653 F.3d 187, 190–91 (3d Cir. 2011); *United States v. Nohara*, 3 F.3d 1239, 1241 (9th Cir. 1993). However, the Sixth Circuit held that evidence obtained as a result of a government agent's presence, without authority or invitation, in the common areas of a locked apartment building must be suppressed. *United States v. Carriger*, 541 F.2d 545, 552 (6th Cir. 1976). Thirty years later, the Sixth Circuit faced a similar set of facts, but this time the building was not locked. *United States v. Dillard*, 438 F.3d 675, 682 (6th Cir. 2006). Without disturbing its holding in *Carriger*, the *Dillard* court found there was no Fourth Amendment violation. *Id.* at 682–83. In qualifying its opinion, the court explicitly noted that "[o]bviously the expectation of privacy in a locked building is greater than in an unlocked building." *Id.* at 683.

A heightened expectation of privacy in a locked building is consistent with this Court's precedent, for it has reasoned that a legitimate expectation of privacy must have its roots outside of the Fourth Amendment in sources where society has recognized them or related to real or personal property. *Byrd v. United States*, 138 S. Ct. 1518, 1527 (2018). A primary right attaching to property ownership is the right to exclude others, and "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." *Id.* (quoting *Rakas v. Illinois*, 439 U.S. 128, 144 (1978)). The Seventh Circuit has applied this reasoning while discussing curtilage in an urban setting, noting that "[i]n a multi-

unit apartment building there may in fact be no curtilage except perhaps in a separate area—*like a basement storage locker*—subject to one's exclusive control." *United States v. Redmon*, 138 F.3d 1109, 1128 (7th Cir. 1998) (en banc) (Evans, J., concurring) (emphasis added).

Applying the four-part test from *Dunn*, tailored to an urban setting, shows that Mr. Collins' storage unit should be considered part of the curtilage of his home. First, in terms of proximity to the home itself, the Fourteenth Circuit relied on the fact that Mr. Collins' storage unit was fifteen floors, approximately 150 to 210 feet, below his apartment to reason that it was not part of the curtilage. (R. 57.) In contrast, the Fifth Circuit, in *Walker v. United States*, found a barn located approximately 210 to 240 feet away from defendant's house was part of the curtilage. 225 F.2d 447, 448 (5th Cir. 1955). There is no reason why vertical distance should be treated any differently than horizontal distance. Additionally, the Fourteenth Circuit's emphasis on the fifteen-floor distance between Mr. Collins' apartment and the storage unit implies it would extend the curtilage protection to the storage unit of a first-floor apartment resident. (R. 57.) However, such logic would only add to the confusion surrounding the scope of the Fourth Amendment if residents of the same building would not receive the same level of protection.

Second, regarding the curtilage being included within an enclosure surrounding the home, Mr. Collins' apartment and storage unit are both housed within the same building. (R. 6.) This Court noted that curtilage includes "the area around the home[,]" not the area within the home. *Dunn*, 480 U.S. at 302. Despite this guidance, the Seventh Circuit still incorrectly claimed that the question is not whether the claimed curtilage was within the same building as the apartment, "but whether it was enclosed and intimate to [defendant's] apartment itself." *Sweeney*, 821 F.3d at 902. The *Sweeney* line of reasoning does not provide for a finding of curtilage; rather, it more logically follows that if the claimed area is enclosed within the apartment itself, it is part of the home and

not part of the curtilage. Regardless of this misconstruction of the scope of curtilage, when applying the authoritative *Dunn* factors in an urban setting, the question should be whether the curtilage and the home are within the same building.

Third, with respect to nature of use, this Court has suggested that to be considered curtilage, the area should be "used for intimate activities of the home." *Dunn*, 480 U.S. at 302. Mr. Collins used his storage unit like a shed to handle the overflow of accumulated personal items such as books, clothes, and furniture—effects "intimately connected to home life." (R. 47, 62.) Because it is impractical for the resident of an apartment building, like Mr. Collins, to own a shed, a storage unit housed within the same building as the apartment should receive the same constitutional protection as a shed in the backyard of a single-family house.

Fourth, Mr. Collins made a concerted effort to shield the area from observation, which the Fourteenth Circuit failed to acknowledge in reaching its final decision. (R. 57–58.) In addition to the storage unit being behind a locked door that only a limited number of people had access to, Mr. Collins took the affirmative step of covering the front of his storage unit with newspaper to conceal its contents. (R. 7, 9.) Also, as shown in the picture from the storage room, only five storage units were occupied, one of which was Mr. Collins'. (R. 9.) Accordingly, the amount of people who could potentially observe Mr. Collins' storage unit was drastically limited. (R. 9.)

Because (1) the storage unit is not far from Mr. Collins' apartment; (2) the storage unit is housed within the same building as the apartment; (3) Mr. Collins used the storage unit as an extension of his home by keeping personal items there; and (4) Mr. Collins took affirmative steps to shield the contents from view of the limited number of potential passersby, Mr. Collins' storage unit should be considered within his curtilage and afforded the same protection as his home under the Fourth Amendment. *See Dunn*, 480 U.S. at 301. Additionally, this finding is consistent with

the traditional definition of curtilage: if Mr. Collins were to catch a different individual, armed with a ski-mask rather than a badge, breaking into his storage unit, this would certainly constitute common-law burglary, such that it would prompt Mr. Collins to "call the police." *See Jardines*, 569 U.S. at 9. Lastly, this Court's explanation in *Byrd* bolsters the recognition of Mr. Collins' reasonable expectation of privacy by virtue of his right to exclude because he exercised lawful possession over the storage unit. *Byrd*, 138 S. Ct. at 1524.

As stated by this Court, "[f]ew protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures." *Id.* Because it is essential to liberty, this Court should correct the practice of giving single-family homeowners more Fourth Amendment protection than apartment owners. Contrary to the Fourteenth Circuit's reasoning, Mr. Collins had an actual expectation of privacy in his storage locker that society recognizes as reasonable. Thus, Agent Simonson's insertion of the key into Mr. Collins' storage unit lock amounted to a search.

B. A search conducted without a warrant, or an exception to the warrant requirement, is an unreasonable search.

Because Agent Simonson's insertion of the key into Mr. Collins' lock amounted to a search and occurred without a warrant or an exception to the warrant requirement, his search was unreasonable. (R. 7.) This Court has emphasized the importance of adhering to the judicial process of the warrant requirement and declared "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. The Government bears the burden of proving an exception to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 445 (1971).

However, the Government waived its opportunity to argue that any exception applies in this case because it failed to raise the issue during the proceedings below. (R. 33.) During the

motion to suppress hearing, the district judge explicitly asked AUSA Twerski if she would "be arguing *any* exceptions" if he determined there was an unreasonable search, to which she declined. (R. 33.) This is analogous to *Jones*, where the Government waited until the case reached this Court to argue that there was probable cause to conduct a search. *Jones*, 565 U.S. at 412. But, because it was not raised at the district court level, this Court deemed the argument forfeited. *Id.*

Even if this Court determines the Government has not waived its opportunity to argue that an exception applies, a valid exception to the warrant requirement did not exist. There were no exigent circumstances present at the time of the search. (R. 6–8.) Exigent circumstances may exist in situations where there is an imminent risk of destruction of the evidence or where the special needs of law enforcement may justify diminishing an individual's expectation of privacy. *Bains*, 874 F.3d at 17. To determine whether the requisite special needs exist to justify the Government's intrusion into an individual's protected liberty, courts employ a balancing test, pitting the privacy interests of the individual against the interests of the Government. *Id.* And, if there is less than probable cause to support the search, the conduct must be "minimally intrusive" and "the only practicable means" available. *Arizona v. Hicks*, 480 U.S. 321, 327 (1987).

Here, there was no risk of destruction of any evidence. Mr. Collins was in his apartment with Agent Sayed without the key to his storage locker when Agent Simonson covertly tested the lock in the basement. (R. 6–8.) Also, contrary to the Government's contention, there was no evidence that Mr. Collins was at risk of fleeing the country to Brooklania and taking any allegedly incriminating evidence with him. (R. 58.) The individuals who fled to Brooklania, like Ms. Roulette, were born in Brooklania and had maintained strong ties there. (R. 55.) Mr. Collins, on the other hand, is not from Brooklania and lacks the same ties to the country as the others involved. Accordingly, it was not reasonable to assume that he was, in any way, a flight risk. Therefore,

because the Government had ample time to obtain a search warrant before conducting any search, providing it with alternative, practicable means of obtaining the information sought, the Government's interests did not sufficiently outweigh Mr. Collins' privacy interests.

Under either the common-law trespassory test or the reasonable expectation of privacy test, Agent Simonson's insertion of the key into Mr. Collins' lock constituted a search. Because there is no dispute Agent Simonson inserted the key into Mr. Collins' lock prior to the Government securing a warrant and a valid exception to the warrant requirement did not exist, his search was unreasonable. This unreasonable search stripped Mr. Collins of his Fourth Amendment liberty, and, as such, this Court should reverse the decision of the Fourteenth Circuit below.

II. The Government's pre-indictment interrogation of an accused individual causes the Sixth Amendment right to counsel to attach because it is essential to protect the accused from withstanding the full force of the prosecutorial system without representation.

This Court should reverse the Fourteenth Circuit's decision to admit Mr. Collins' statements solicited from an undercover agent because it relied on an erroneously narrow interpretation of *Kirby v. Illinois* in finding that the Sixth Amendment right to counsel attaches only after formal charge, preliminary hearing, arraignment, indictment, or information filed against a defendant. (R. 58.) Rather, in accordance with the historical purpose and underlying policy of the Sixth Amendment, the right to counsel attaches once the Government initiates adversarial proceedings and confronts the accused with the full force of the prosecutorial system. *United States v. Gouveia*, 467 U.S. 180, 187 (1984). This interpretation of the right to counsel resolves the aversion among circuit courts to apply an overly rigid interpretation of *Kirby*, just as the Fourteenth Circuit did, to ensure that justice is properly served. *United States v. Hayes*, 231 F.3d 663, 680 (9th Cir. 2000) (Reinhardt, J., dissenting). Because Mr. Collins was the focus of a material witness deposition, a target of an extensive FBI investigation, and deemed an associate of an already

charged, alleged co-conspirator, this Court should find that Mr. Collins' Sixth Amendment right to counsel attached when he was surreptitiously confronted by the Government. (R. 36.)

A. In light of the core purpose behind the Sixth Amendment right to counsel, *Kirby* did not create an exhaustive list of events describing when the right attaches.

Because the Sixth Amendment right to counsel was historically intended to protect individuals confronted by the Government during the criminal justice process, it does not logically follow that the list of events delineated in *Kirby* constitutes an exhaustive set of occasions upon which the right to counsel attaches. *See generally, United States v. Ash*, 413 U.S. 300 (1973). Instead, this Court should find that *Kirby* is merely an exemplary list, and the right to counsel can attach at other points in the adversarial process, such as when modern prosecutorial practices create trial-like confrontations prior to the filing of formal charges. *Id.* at 310. This broader interpretation better aligns with the core purpose of the Sixth Amendment and creates a more equitable criminal justice system. *Rothgery v. Gillespie County*, 544 U.S. 191, 215 (2008) (Alito, J., concurring).

i. The history of the Sixth Amendment right to counsel favors a broad interpretation of Kirby*, which is necessary to endure modern prosecutorial practices.*

This Court should reverse the Fourteenth Circuit's decision because it improperly relied on an overly narrow interpretation of *Kirby*. (R. 58.) The Sixth Amendment serves the critical function of protecting citizens from unfairness and abuse when confronted with the prosecutorial forces of organized society by offering various procedural safeguards designed to resolve the power imbalance inherent in an adversarial system. *See generally, Ash*, 413 U.S. at 300. The Sixth Amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence." U.S. CONST. amend. VI. However, when exactly the Sixth Amendment right to assistance of counsel attaches has been subject to copious debate among the courts. *See, e.g.*, Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge*

Attachment of the Sixth Amendment Right to Counsel, 92 WASH. L. REV. 213 (2017). Relying on the oft-cited words of Justice Stewart from the plurality opinion of *Kirby v. Illinois*, some courts, including the Fourteenth Circuit below, have held that the right to counsel can only attach "at or after the initiation of adversary judicial criminal proceedings—*whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.*" 406 U.S. 682, 689 (1972) (emphasis added). However, by interpreting this language as an absolute and exhaustive list detailing the only events in which the assistance of counsel attaches, courts have been erroneously stripping essential constitutional protections away from those faced with the inherent imbalances of the criminal justice system. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("[t]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'" (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

Instead, when read in light of the core purpose and history of the Sixth Amendment, it becomes clear that *Kirby* presents a purely exemplary list of instances in which the right to counsel attaches. *Rothgery*, 544 U.S. at 215 (Alito, J., concurring). The deep history of the Sixth Amendment right to counsel was explained by this Court in *Ash*, which examined the Constitutional Framers' motive in developing a system which balanced the power between the accused and the professional prosecutor. 413 U.S. at 309. This historical review clarified that the purpose of the guarantee "was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *Id.* In other words, the "guiding hand of counsel" is necessary whenever a layperson is faced with the complexities of the legal system because, "though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

The history of the Sixth Amendment also reveals that when the Bill of Rights was adopted, the Framers could not have foreseen the machinery of the criminal justice system as it exists today, with citizens facing the full force of the law far before trial begins. *Ash*, 413 U.S. at 310 (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)) ("[t]he accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself"); *see also Turner v. United States*, 885 F.3d 949, 960–62 (6th Cir. 2018) (the Crimes Act of 1790 distinguished between "accused" and "indicted," demonstrating a distinction between the two when the Bill of Rights was adopted). As modern criminal procedure has evolved, there now exist pretrial events which create the same trial-like confrontations that originally gave rise to the "critical stage" definition of attachment. *Wade*, 388 U.S. at 224; *see also Coleman v. Alabama*, 299 U.S. 1 (1970) (preliminary hearing considered a critical stage of an Alabama prosecution); *Massiah v. United States*, 377 U.S. 201 (1964) (right to counsel attached when Government attempted to surreptitiously elicit incriminating statements from defendant while he was free on bail). Thus, to ensure the Sixth Amendment offers the same degree of protection today as it did when it was adopted, the inquiry into whether the guarantee of counsel applies in a particular case must focus on whether "the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *Ash*, 413 U.S. at 310; *see also Wade*, 388 U.S. at 225.

By refocusing the attachment inquiry on the nature of the confrontation between the Government and the individual, and away from a static list of events, this Court can ensure citizens are not forced to navigate the legal system alone in the event that such a confrontation has the ability to "settle the accused's fate and reduce the trial itself to a mere formality." *Wade*, 388 U.S. at 224; *Gouveia*, 467 U.S. at 195 (Stevens, J., concurring). Because the means by which criminal prosecutions occur are ever evolving, it is essential that the definition of attachment preserves the

original intent of the Sixth Amendment, thereby guaranteeing constitutional rights cannot be circumvented by formalism of the law. *See generally, Maine v. Moulton*, 474 U.S. 159, 176 (1985); *Brewer v. Williams*, 430 U.S. 387, 408–09 (1977) (Marshall, J., concurring). An accused citizen should be no less entitled to protection from the same dangers that originally gave birth to the right to counsel itself merely because a list of events established decades ago failed to consider new ways in which the Government could assert its adverse position against him. *Ash*, 413 U.S. at 311.

Thus, the language repeated throughout the Sixth Amendment jurisprudence that the right to counsel attaches "during the initiation of adversary judicial criminal proceedings," is more than mere formalism. *Rothgery*, 544 U.S. at 198. The years of history describing the core purpose of the right to counsel and its impact on when the right attaches cannot be reduced to a list of five specific instances. *Id.* at 215 (Alito, J., concurring). Accordingly, to comport with the long history of the constitutional protection, *Kirby* must be read as an exemplary list, not an exhaustive one.

ii. Even the circuit courts that found Kirby *was an exhaustive list agree that justice is not served with such a rigid interpretation of the constitutionally protected right to counsel.*

Despite the extensive history describing the core purpose behind the Sixth Amendment and the occasions upon which the right to counsel was always intended to apply, many courts, including the Fourteenth Circuit, remain fixated on Justice Stewart's list in *Kirby*. In its opinion below, the Fourteenth Circuit asserted that a majority of courts have interpreted *Kirby* as announcing a bright line rule but failed to note that each of the courts cited had done so under some form of protest. (R. 58–59.) Each of the cases cited in the opinion below indicated some reluctance in adhering to the bright line rule yet did so for the sake of *stare decisis*. *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000) (lacking the authority to overrule the decision of an earlier panel despite finding the dissent's rationale convincing); *Hayes*, 231 F.3d at 675 (admitting that

adherence to the bright-line rule made the court "queasy"); *United States v. Mapp*, 170 F.3d 328, 334 (2d Cir. 1999) (deciding the case on non-*Kirby* grounds to avoid interpreting its ambiguities).

For example, in *Moody*, a case relied upon by the Fourteenth Circuit to demonstrate broad-sweeping acceptance of the bright line interpretation of *Kirby*, the Sixth Circuit repeatedly expressed discomfort with such an unyielding rule. 206 F.3d at 614. Yet, in an effort to prevent "anarchy [from] prevail[ing] within the federal justice system," the Sixth Circuit felt bound by *Kirby* in holding a citizen was not entitled to counsel during a plea bargain. *Id.* (quoting *Hutto v. Davis*, 454 U.S. 370, 375 (1982)). In holding so, the court noted it was a mere formality Moody was not yet indicted, causing the form of the law to win over substance that day. *Id.* at 615. This is because, as the Sixth Circuit pointedly noted, "[b]ut for the delay of the prosecution in filing charges, Moody clearly would have been entitled to the effective assistance of counsel." *Id.* Despite the fact the Government's adverse position against Moody was firmly solidified, the court felt compelled to conclude that Moody had no right to counsel. *Id.* at 616.

Fortunately, numerous other jurisdictions have rejected this rigid interpretation of the law and, instead, read *Kirby* in light of the overarching purpose of the Sixth Amendment to conclude that the right to counsel can attach prior to being formally charged. *See, e.g.*, *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999). For example, the Third Circuit explained that, in reading the list presented in *Kirby* in view of this Court's decision in *Gouveia*, the right to counsel "may attach at earlier stages" than those described in *Kirby* when "the accused is confronted . . . by the procedural system, or by his expert adversary . . . where the results of the confrontation might well settle the accused's fate." *Id.* at 892. The Seventh Circuit similarly held that the right to counsel may attach in instances outside those identified in *Kirby*, provided the Government has crossed the line from factfinder to adversary. *United States ex. rel. Hall v. Lane*,

804 F.2d 79, 82 (7th Cir. 1986). Additionally, the First and Fourth Circuits have also reasoned that the right to counsel can attach prior to indictment or arraignment. *See, e.g.*, *United States v. Burgess*, No. 96-4505, 1998 WL 141157 at *1 (4th Cir. Mar. 30, 1998) ("the crucial inquiry is whether authorities have committed themselves to prosecute"); *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) (recognizing "the possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment").

By failing to acknowledge the deep history giving rise to the right to counsel and, instead, following a formulaic approach to the constitutional rights of citizens, the courts concluding *Kirby* provides a bright line rule ignore precedent equally important and revealing as *Kirby*. *See generally*, *Moulton*, 474 U.S. at 160; *Wade*, 388 U.S. at 235. By adopting such a hard and fast rule without acknowledging the rationale behind it, these courts have done precisely what has been warned might result from emphasizing the timing of attachment over nature of the confrontation—such a rule "exalts form over substance" of the law. *Escobedo v. Illinois*, 378 U.S. 478, 486 (1964). The Fourteenth Circuit claims such a rule is necessary to allow uniformity and public confidence in the legal system but blindly adopting a rule does just the opposite. (R. 59.) Plainly, justice is not served if it is simply the act of writing an accusation on a formal piece of paper which dictates whether an individual is afforded their constitutional rights.

B. Because *Kirby* is not an exhaustive list, the Sixth Amendment applies when law enforcement interrogates an accused individual prior to formal indictment.

The Sixth Amendment right to counsel attaches when an individual has been accused in a criminal proceeding, and an individual is considered accused once adversarial judicial proceedings have commenced. *Kirby*, 406 U.S. at 689. Certain pre-trial events, such as taking material witness depositions, can transition the Government from factfinder to adversary, and the individual from suspect to accused. *Hayes*, 231 F.3d at 677 (Reinhardt, J., dissenting). The Government's treatment

of Mr. Collins prior to the undercover FBI interview demonstrates the Government accused Mr. Collins of a crime, as he was the target of an FBI investigation, the focus of a material witness deposition, the subject of a search warrant, and the alleged partner of an already charged defendant.

i. Material witness depositions taken in accordance with Federal Rule of Criminal Procedure 15 initiate criminal proceedings.

By conducting a material witness deposition, which had the potential to seal Mr. Collins' fate at trial, the Government accused Mr. Collins, meaning his Sixth Amendment right to counsel had attached. (R. 11.) The essential question in determining when the Sixth Amendment right to counsel attaches is whether adversarial judicial proceedings have commenced. *Kirby*, 406 U.S. at 689. Knowing that *Kirby* does not provide an exhaustive list of events upon which the right to counsel attaches, it is a reasonable conclusion that the right to counsel should also attach upon the taking of material witness depositions in accordance with Federal Rule of Criminal Procedure 15 ("Rule 15 depositions"). *Hayes*, 231 F.3d at 677 (Reinhardt, J., dissenting).

Federal Rule of Criminal Procedure 15 allows either party in a criminal case, in light of "exceptional circumstances and in the interest of justice," to depose a witness in order to preserve their testimony for trial. FED. R. CRIM. P. 15. The purpose, result, and language of Rule 15 demonstrate that these depositions create trial-type confrontations with the Government. *See generally*, *Hayes*, 231 F.3d at 677 (Reinhardt, J., dissenting). For example, Rule 15(e)(2) states that "[t]he scope and manner of the deposition examination and cross-examination must be the *same as would be allowed during trial*." FED. R. CRIM. P. 15(e)(2) (emphasis added). This unambiguous language leaves no doubt that these depositions create trial-type confrontations with the Government upon which the right to counsel should exist. *See Gouveia*, 476 U.S. at 190 ("right to counsel exists to protect the accused during trial-type confrontations with the prosecutor").

Further, the purpose behind taking material witness depositions is to obtain substantive evidence for trial. *Hayes*, 231 F.3d at 677 (Reinhardt, J., dissenting). Rule 15 depositions are notably "*not* taken for discovery or investigatory purposes but for the unabashed purpose of preserving testimony for use against [a defendant] at trial." *Id.* (quoting *United States v. Hayes*, 190 F.3d 939, 948 (9th Cir. 1999) (Silverman, J., dissenting)). Accordingly, the Government could rely solely on this substantive evidence to obtain a conviction against an individual prior to trial. *Id.* It is difficult to rationalize how the Government could still be acting exclusively as an investigator, and not as an adversary, when attempting to gather evidence specifically for use against an individual at trial. *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (noting the right to counsel attaches when the Government's position shifts from investigation to accusation).

Lastly, Rule 15 depositions were always intended to occur post-indictment. *Hayes*, 231 F.3d at 673. The use of the terms "defendant" and "case" indicate that the rule intended to impact a party who has already been accused. *Id.* at 677 (Reinhardt, J., dissenting). This choice of language bolsters the admitted fact that Rule 15 depositions were intended to occur post-indictment, "at which the defendant's right to counsel has indisputably attached." *Id.*

The Third Circuit, having considered these factors, has already characterized Rule 15 depositions as "a critical stage of the prosecution" during which due process rights are implicated. *United States v. Gifford*, 892 F.2d 263, 265 (3d Cir. 1989). Although the Ninth Circuit declined to extend the right to counsel to a situation where material witness depositions were taken prior to indictment, the court conceded that *post-indictment* Rule 15 depositions could constitute a critical stage in a prosecution "because of the potential consequences of such depositions at trial." *Hayes*, 231 F.3d at 674. Yet, because the Rule 15 depositions in *Hayes* were conducted pre-indictment and because the Ninth Circuit felt compelled to follow *Kirby* strictly, the court determined that the

Rule 15 depositions taken pre-indictment did not trigger the right to counsel. *Id.* Despite reaching this conclusion, the *Hayes* court felt obliged to note that it was "queasy" with the outcome because the Government attempted to "have its cake and eat it too," by toeing an unintended gap in the constitutional protections of defendants. *Id.* at 675. Compelled by exact adherence to precedent, the Ninth Circuit exalted form over substance of the law in reaching its decision. *Id.*

The ultimate effect of a pre-indictment Rule 15 deposition is to initiate the adversarial judicial proceeding without the filing of formal charges. *Id.* at 676 (Reinhardt, J., dissenting). If the taking of Rule 15 depositions is considered a "critical stage" in the proceeding when taken *post*-indictment because of the nature of the confrontation and the substantive evidence procured during the event, as the *Hayes* majority admits, *pre*-indictment Rule 15 depositions should be treated the same. *Id.* at 674. Instead of focusing on whether an allegation was formally filed, the focus of the inquiry into whether the right to counsel attaches should always remain on the nature of the confrontation between the individual and the Government. *Wade*, 388 U.S. at 224.

Thus, by the time the material witness deposition of Mr. Hoag-Fordjour took place on January 8, 2021, the Government had already engaged the prosecutorial system to gather substantive evidence for use at trial against Mr. Collins. (R. 11.) Regardless of whether that testimony was actually used in the trial, just by taking the deposition, the Government's role shifted from mere factfinder to prosecutor. *Hayes*, 231 F.3d at 679 (Reinhardt, J., dissenting).

ii. When an individual has been openly targeted and investigated prior to being formally charged, they are nonetheless accused for Sixth Amendment purposes.

Even though Mr. Collins had not been formally charged when the undercover conversation at Hoyt's occurred, he was, for all intents and purposes, accused of a crime. (R. 35–36.) Despite the trial-like confrontations between Mr. Collins and the Government, the Fourteenth Circuit concluded he had no right to counsel after being manipulated into making allegedly incriminating

statements to the Government. (R. 59.) It is incomprehensible that Mr. Collins, who had been openly targeted for over a week, investigated for months, discussed throughout a material witness deposition, and subjected to a government search of his home did not have the right to counsel solely because no government agency filed an official allegation against him. (R. 36.)

Just like the defendant in *Moody*, it was a mere formality that the Government had not yet indicted Mr. Collins at the time of the Government's covert investigation. *See generally*, *Moody*, 206 F.3d at 615. Agent Sayed admitted that, prior to the clandestine conversation, the Government "knew we had enough evidence at this point, but we already had the plan for our undercover investigation." (R. 47.) The minor inconvenience of canceling a plan is not enough to justify intruding upon a constitutionally protected citizen. As aptly stated in *Brewer*, "good police work is something far different from catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its commands scrupulously." 430 U.S. at 407 (Marshall, J., concurring).

Additionally, the Government afforded Ms. Roulette the courtesy of being formally charged just two days prior to arresting Mr. Collins. (R. 56–57.) Under the pretense it was less concerned that Mr. Collins would flee the country, the Government proceeded to hastily gather as much additional evidence about Mr. Collins as possible despite knowing it was depriving him of the constitutional protections shielding other targets of the investigation. (R. 56–57.) Even though Mr. Collins' name was consistently raised beside Ms. Roulette's, particularly in the material witness deposition and in the grand jury proceedings, Mr. Collins' constitutionally protected liberty was treated differently than Ms. Roulette's. (R. 13; 25–27.) The prosecution has "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the [defendant's] right to counsel." *Moulton*, 474 U.S. at 171. By exploiting procedural

mechanisms that create gaps in constitutional protections, the prosecution deliberately circumvented the right to counsel by employing a confidential informant to solicit potentially incriminating information from Mr. Collins. *See, e.g.*, *Massiah*, 377 U.S. at 205.

Even the trial court was admittedly uncomfortable with the decision affirmed by the Fourteenth Circuit below. (R. 41.) The Government inched toward the "bright" line set by *Kirby* and took advantage of the ambiguities created by such a rigid pronouncement of the right to counsel. (R. 58.). It should no longer be acceptable for such alarming police tactics to be used to circumvent the true requirements of justice. *Moulton*, 474 U.S. at 176. Therefore, this Court should reverse the decision of the Fourteenth Circuit and instead find that Mr. Collins' Sixth Amendment right to counsel was violated because Mr. Collins was, for all intents and purposes, accused at the time of the undercover interrogation.

III. The grand jury testimony of a key witness who is now unavailable is admissible under Federal Rule of Evidence 804(b)(1) because the Government's motive in developing the testimony was similar to what it would have been at trial.

The Fourteenth Circuit erred by failing to admit Ms. Washington's grand jury transcript because the Government was similarly motivated in establishing Mr. Collins' knowledge during the grand jury proceedings as it would have been during trial. (R. 61.) The plain language of Federal Rule of Evidence 804(b)(1) requires demonstrating similar motive in questioning to admit former testimony, not the same motive nor similar intensity of motive. *United States v. McFall*, 558 F.3d 951, 963 (9th Cir. 2009). Accordingly, this Court should find the Government's motive would have been similar in both proceedings. (R. 61.)

A. Under Rule 804(b)(1), the Government is only required to have similar motive to develop the testimony at grand jury as it did at trial, not the same intensity of motive.

This Court should reverse the decision below excluding relevant grand jury testimony under Rule 804(b)(1) because the Fourteenth Circuit adopted an improperly narrow interpretation

of the evidentiary rule. Rule 804(b)(1) permits the admission of former testimony that would otherwise be excluded as hearsay made by a now unavailable declarant witness if that testimony:

> (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
> (B) is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and *similar motive* to develop it by direct, cross-, or redirect examination.

FED. R. EVID. 804(b)(1) (emphasis added). While there is no dispute Ms. Washington was unavailable in accordance with Federal Rule of Evidence 804(a), the parties disagree as to whether the Government had a "similar motive" in developing her testimony during the grand jury proceeding as it would have had during trial. (R. 51, 59). This Court has yet to provide explicit guidance as to what constitutes a "similar motive," but based on the purpose and history of the evidentiary rule, Ms. Washington's grand jury testimony should have been admitted. *See United States v. Salerno*, 505 U.S. 317, 325 (1992); *see also McFall*, 558 F.3d at 951.

In *Salerno*, this Court held that under Rule 804(b)(1), grand jury testimony of an unavailable witness may be introduced at trial against the Government if the Government had a similar motive to develop the witness' testimony on both occasions. *Salerno*, 505 U.S. at 325. Without more, however, district courts have been left to independently determine what constitutes a similar motive, with some circuits reaching a more practical standard than others. *See, e.g.*, *McFall*, 558 F.3d at 963 (comparing the fundamental objectives in the former occasion and trial); *United States v. Miller*, 904 F.2d 65, 68 (D.C. Cir. 1990) (finding similarity in proving guilt or innocence sufficient to establish similar motive); *but see United States v. DiNapoli*, 8 F.3d 909, 912 (2d Cir. 1993) (requiring evaluation of similarity of intensity of interest); *United States v. Omar*, 104 F.2d 519, 523 (1st Cir. 1997) (finding grand jury testimony never sufficiently similar).

The Fourteenth Circuit improperly followed the Second Circuit, which construed the "similar motive" requirement so narrowly that Rule 804(b)(1)'s applicability to grand jury testimony is obviated. *DiNapoli*, 8 F.3d at 919 (Pratt, J., dissenting). In devising the narrow interpretation of "similar motive," the Second Circuit first stated there should be no blanket rules regarding any particular type of testimony, yet later prescribed a test which essentially barred the admission of grand jury testimony under Rule 804(b)(1). *DiNapoli*, 8 F.3d at 914–15. Specifically, it held that an assessment of "similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue." *Id.* However, this focus on the similarity of the intensity of the motive effectively changes the evidentiary rule from "similarity of motive" to "same motive." *Id.* at 916 (Pratt, J., dissenting).

The Second Circuit's intensity of motive test also improperly weighs the various factors it considers relevant to the determination of similarity. *Id.* at 915. For example, the *DiNapoli* court stated that the cross-examination in the prior proceeding should be awarded less weight than factors such as what is at stake in the proceeding and the burden of proof at each event. *Id.* However, this balance vastly undermines the established importance of cross-examination on the reliability of former testimony, which was critical in cementing such testimony's place among the hearsay exceptions. *See* FED. R. EVID. 804 advisory committee's note. The Second Circuit even admitted in a subsequent case that, of all the hearsay exceptions in Rule 804, former testimony is the "strongest hearsay" because of the high degree of reliability created by the strict requirements of the Rule, such as oath and cross-examination. *United States v. Bahadar*, 954 F.2d 821, 827 (2d Cir. 1992). Yet courts following the Second Circuit still emphasize the need for "substantially similar intensity," despite these inherent indicia of reliability. *See DiNapoli*, 8 F.3d at 914–15.

Because the implication of the Second Circuit's intensity of motive test effectively changes the requirements of this evidentiary rule, this Court should instead follow the Sixth, Ninth, and District of Columbia Circuits, which evaluate the Government's motives in each proceeding at a higher level of generality. *See generally*, *McFall*, 558 F.3d at 963; *Miller*, 904 F.2d at 68; *United States v. Foster*, 128 F.3d 949, 957 (6th Cir. 1997). For example, in *McFall*, the Ninth Circuit examined the conflicting views between the circuits and concluded it is "the government's fundamental objective in questioning" the witness which must be evaluated to determine the similarity of motive between the events, as this approach better reflects the purpose behind the hearsay exception. 588 F.3d at 963. In emphasizing its conclusion, the Ninth Circuit repeated the universally accepted words of Justice Blackman—"similar motive does not mean identical motive." *Id.* (quoting *Salerno*, 505 U.S. at 326 (Blackman, J., concurring)).

Additionally, just because the Government chose not to act on an opportunity to cross-examine does not mean that the Government lacked the opportunity or motivation to develop the testimony. *United States v. Mann*, 161 F.3d 840, 861 (5th Cir. 1998). Even the First Circuit, which adopted a narrow interpretation of Rule 804(b)(1), admitted that a "purely tactical decision not to develop particular testimony . . . does not constitute a lack of opportunity or a dissimilar motive for purposes of Rule 804(b)(1)." *United States v. Bartelho*, 129 F.3d 663, 672 n.9 (1st Cir. 1997).

The underlying purpose of the Federal Rules of Evidence emphasizes a desire to ensure the fact finder appreciates the full scope of the case in order to reach an honest and just conclusion. *Lloyd v. Am. Export Lines, Inc.*, 580 F.2d 1179, 1186 (3d Cir. 1978). Accordingly, Rule 804(b)(1) must be read in a manner that favors admission when such evidence could assist the jury and is not otherwise prohibited by rule or law. *Id.* To ensure the jury hears all relevant evidence admissible under the Federal Rules of Evidence, and to guarantee similarity of motive is not

convoluted with similarity of intensity, this Court should find that the Fourteenth Circuit adopted an erroneously narrow interpretation of "similar motive." (R. 61.)

B. When a key witness is questioned at a grand jury proceeding about a defendant's knowledge and involvement in a criminal scheme, the Government's motive is similar to what it would be at trial.

Because the Government questioned Ms. Washington about essential elements of Mr. Collins' charges and confirmed she was testifying honestly during the grand jury proceedings, it had a similar motive in questioning Ms. Washington as it would have had at Mr. Collins' trial. When Ms. Washington testified, beyond being just a target, Mr. Collins had been arrested, charged, arraigned, and held without bail. (R. 21, 56.) Thus, the motivation of the Government at the grand jury proceeding was primarily designed to establish a preliminary case against Mr. Collins. (R. 22–27.) If the Government elected not to push the examination of Ms. Washington during the grand jury proceeding for tactical reasons, then the Government must "accept the consequences of that decision—including the possibility that the testimony might be introduced against [it] in a subsequent proceeding." *Salerno*, 505 U.S. at 329 (Stevens, J., dissenting).

At the grand jury proceeding, the Government questioned Ms. Washington about Mr. Collins' involvement in Ms. Roulette's gambling operation. (R. 23–24.). Specifically, the Government prodded Ms. Washington with questions attempting to elicit Mr. Collins' knowledge as to what was occurring in the basement of Hoyt's. (R. 24–25.) Knowledge is an essential element of each of the counts upon which Mr. Collins had been charged. (R. 1–3.) Accordingly, at the grand jury proceedings, the Government's primary motivation was to prove Mr. Collins' knowledge of the criminal enterprise. Because knowledge is an essential element to Mr. Collins' charges, the Government was equally motivated in demonstrating his knowledge at trial. (R. 1–3.)

The Government's motivation in the grand jury proceeding is further evidenced by its interest in the falsity of the testimony being presented by Ms. Washington. (R. 27.) The Government explicitly reminded Ms. Washington that she was under oath and subsequently asked if she understood the implications of perjury. (R. 27.) Regardless of why the Government did not feel inclined to discredit her testimony, the opportunity to challenge the veracity of her testimony nevertheless presented itself. (R. 27.) The Government should not be able to avoid exculpatory evidence merely because it does not support its case under the guise of prosecutorial strategy. *Mann*, 161 F.3d at 861.

In sum, the Government's motive in developing Ms. Washington's testimony at the grand jury was similar to the motive it would have had at trial. The fundamental objective at the grand jury proceeding was to establish Mr. Collins' involvement and knowledge regarding the criminal scheme headed by Ms. Roulette. (R. 1–2.) The fundamental objective at trial was similar—to establish every element of Mr. Collins' charges. (R. 1–3.) Regardless of the manner in which the Government handled the witness or the strategies it pursued during the grand jury proceedings the Government had a similar motive in examining the witness as it would have had during trial. Therefore, the Fourteenth Circuit erred by excluding Ms. Washington's grand jury testimony.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fourteenth Circuit's decision (1) finding an unreasonable search had not occurred, (2) admitting allegedly incriminating statements made to an undercover agent outside the presence of counsel, and (3) excluding relevant grand jury testimony of a now unavailable witness.

Respectfully submitted,

Team 12P
Counsel for Petitioner